

1720164 (Migration) [2018] AATA 2513 (5 June 2018)

1.

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1720164
MEMBER:	Gabrielle Cullen
DATE:	5 June 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicants Student (Temporary) (Class TU) visas.

Statement made on 05 June 2018 at 10:47am

CATCHWORDS

Migration – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – Bogus documents – Account balance certificate – Bank letter – First instance report (FIR) – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), r 1.03, Schedule 2 cls 500.217, 573.224, Schedule 4 PIC4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

TATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 August 2017 to refuse to grant the applicants Student (Temporary) (Class TU) visas under s.65 of the *Migration Act 1958* (the Act).
3. The applicants applied for the visas on 28 November 2016. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.500.217(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he provided a bogus document in relation to his visa application. More specifically, with his application the applicant provided several documents to support his claim he had access to sufficient funds to support his stay onshore. This included an Account Balance Certificate issued by [Bank 1], [dated] 15 November 2016. This document in the name of his father [demonstrates] an available balance as at 14 November 2016 of 5,350.313 PKR. A statement of transactions was also included for the above account. The documents were referred to the offshore Australian post in Islamabad by the Department who contacted the [staff], [and] provided him with the account number, name and address of the account in question. [The staff] confirmed the account as genuine, advising it was opened on 4 November 2016. However, he advised that the account was opened with an initial deposit of [an amount] and had no further transactions since being opened and a balance as at 16 January 2017 of 875 PKR.
4. The Department decision submitted by the applicant to the Tribunal records that on 3 April 2017 the applicant, via his migration agent was requested to comment on the information in the above paragraph. The letter referred to PIC 4020 and raised with him that the provision of a bogus document may lead the Department to refuse his application. He was given 28 days to respond. In a response dated 28 June 2017 he referred to his good immigration history and education background. The applicant indicated he was unaware that the document he had submitted was a fraudulent document. He claimed his father died [in] March 2017 and he therefore could not access the accounts and due to holidays could not clarify the matter in the time frame requested. He notes his father was suffering from [health] problems prior to his death and throughout the relevant time. He provided different documentation to support the financial capacity requirements for his student visa. He also submitted that he sought a waiver under PIC 4020(5) as he will face considerable hardship if this visa is not granted as he will have to start his studies from scratch as he will have to return to his home country.
5. The Tribunal sought the original documentation from the Post as to their discussions with [Bank 1]. The information contained within is as outlined in the Department decision as to their enquiries with [Bank 1] via the overseas Post.
6. On 2 May 2018 the applicant submitted the following letter.

Unfortunately, it was true that there were no funds available at the time of investigation by DIBP, but at the same time I've no intentions of obtaining the visa by providing fraudulent documents. As it was a fraud itself which had happened to my father.

My father [opened] a running finance account in [BANK 1] through an agent named [Mr A] who was acting as a bank's employee with [an amount]. In order to provide that bank statement my father gave him [an amount of] cash to deposit into account. In one week of time he provided the bank statement which was stamped and signed by bank's manager, without knowing his intentions my father forwarded to me which I had submitted to immigration.

Due to his funny medical conditions he didn't follow up with the bank and eventually had a [medical incident] on 7th Jan 2017. He end up having [tests] and advised for bed rest by the doctors, which continues until [March] 2017 when I lost my father. I wasn't even able to travel as my visa was under process and semester was undergoing too.

Ultimately, when we received email from the department that there wasn't any such funds available your account, we came to know that above mentioned person who was pretending as an employee of [Bank 1] actually did fraud with us by providing fake documents and took away my father's money as well.

Despite all this happened with us, when I've given 28 days by immigration to comment on this matter, my mother who is my financial supporter after my father, organised funds and I've given bank statement to DIBP with the required amount of funds.

Subsequently in relation to this matter, my mother [has] filed a case against that person and bank manager as it cannot be done without his involvement. We are hoping that father's money will soon be recovered.

In the end, I would like to say that I do respect Australian policies and laws as I've never been involved in any criminal activity or any violation of law and always had been granted with visa as I've fulfilled the conditions but unfortunately, this uncontrolled event had occurred due to that person.

Due to his funny medical conditions he didn't follow up with the bank and eventually had a [medical incident] on 7th Jan 2017. He end up having [tests] and advised for bed rest by the doctors, which continues until [March] 2017 when I lost my father. I wasn't even able to travel as my visa was under process and semester was undergoing too.

7. He attached information as to the illness and death of his father and a letter from [the] applicant's mother to the police, which he referred to at hearing as an FIR or First Instance Report. In it his mother refers to the corrupt conduct of [Mr A] who was acting as an employee of the mentioned bank and provided fraudulent documents. The applicant also provided another statement from [another bank] as evidence of meeting the financial capacity requirements.
8. The applicants appeared before the Tribunal on 9 May 2018 to give evidence and present arguments. The second named applicant chose not to give evidence. The Tribunal hearing was conducted with the assistance of an interpreter in the Urdu (Pakistan) and English languages. The applicant however indicated he wished the hearing to be conducted in English and to use the interpreter when needed.
9. The Tribunal outlined the requirements of PIC 4020 including the waiver provisions and advised the applicant that the issue before the Tribunal is whether there is evidence that the applicant has provided a bogus document in relation to the visa application. It outlined how it considered this evidence to be a material particular in relation to the application for the student visa in that it relates to the financial capacity requirements in cl.500.214. It outlined the evidence provided by the Post following its contact with the Bank advising that the document from [Bank 1] dated 14 November 2016 is not genuine and a fake. The applicant in response indicated that at the time it was submitted he did not know it was a fake document. He advised that he now knows that it is a fake document but argued that it was the agent that provided and produced the fake document and he did not know it was fake nor was involved in providing a fake document. He confirmed that the agent knowingly provided a false document. He said his father opened the account on 14 November 2016 with [an amount of] rupees and contacted an agent, [Mr A] to assist in opening the account.

He said that on 7 January 2017 his father had a [medical incident] and he had given [Mr A] the amount to submit in the account but [Mr A] disposed of it fraudulently. He said his father was very sick during these days and could not follow it up. He said when his father gave him the bank statement organised by [Mr A] as the agent his father thought it was genuine as well. He said his father died [in] March 2017 and his mother lodged an FIR [in] March 2017, as per the attached document, to investigate where the money was. He said when, on 1 June 2017, the Department gave him the information that the document was fraudulent and he had 28 days to comment; he said his Mum was depressed after the death of his father and her brain was not working. He said his mother did not tell him (the applicant) then of the FIR submitted and the suspected fraud but only told him later. The Tribunal questioned the credibility of this claim and why when he was being investigated for supplying a fraudulent document and was in phone contact with his mother she would not have told him of the FIR and concerns with [Mr A]. It noted he did not refer to it in his response to the Department. He repeated that his mother was not well because of the death of his father around that time and only told him later. The Tribunal raised with him the credibility of the claim and the prevalence of document fraud in Pakistan and that it may not place weight on the document as evidence of his claim.

10. The Tribunal raised with him the case of *Trivedi v MIBP* which found that it was not necessary for the Tribunal to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged, rather that there needed to be an element of fraud or deception by some person necessary to attract the operation of the provision. It referred to the fraudulent behaviour of their agent, [Mr A]. He repeated that he did not know and noted that the documents he had since provided shows he meets the financial capacity requirement for the grant of a student visa.
11. The applicant advised he was in his last semester for the Bachelor [degree] which is due to finish in July 2018.
12. The Tribunal asked him questions as to whether there are certain compelling or compassionate reasons justifying the granting of the visa and outlined cl.4020(4). He responded that he did not know it was fake; he had been in Australia for 6 years and met all the requirements of Australian law, studied well and completed the requirements. He said he does not want a PIC 4020 mark on him especially as he did not know it was fake.
13. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.cl.573.224(a) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or

refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

15. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

16. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
17. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
18. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
19. According to s. 5 (1) of the Act a ***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.
20. The Tribunal raised with the applicant the information obtained by the Department and outlined in its decision, that the bank letter in question is a bogus document. The applicant did not dispute the accuracy of the information obtained by the Department as to the document not being genuine and accepted it was a fake document. On the material before it the Tribunal is satisfied that the document is counterfeit and has been altered in a material way by a person who did not have the authority of the [Bank 1] to do so. The Tribunal therefore

finds that the applicant has given a bogus document as defined in s. 5(1) of the Act in relation to the visa application.

21. The Tribunal has considered whether the information and document was provided inadvertently. That is whether the information was purposely untrue rather than just innocent or unintended. The applicant claimed that he was not aware of any problem with the document when it was provided. It was his evidence that he believed it to be a genuine document and only found out it was fake after he was informed by the Department. It was his evidence he then discovered that the agent in Pakistan had issued a bogus document. The Tribunal finds that there was an element of fraud or deception by the applicant's agent in Pakistan in providing the documents.
22. Therefore, the applicant does not meet cl.4020(1).

Should the requirements of cl.4020(1) or (2) be waived?

23. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
24. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
25. The Department provides guidance to its officers through the Procedures Advice Manual (PAM). These guidelines are not binding on the Tribunal but regard may be had to them when they're not in conflict with the legislation.
26. Under PAM3 there may be compelling circumstances affecting the interests of Australia if:
 - Australia's trade or business opportunities would be adversely affected were the person not granted the visa (Note: under policy, gaining employer sponsorship is not considered sufficient grounds for a waiver)
 - Australia's relationship with a foreign government would be damaged if the person is not granted the visa or
 - Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.

It is Departmental policy that compelling circumstances affecting the interests of Australia would not include circumstances where the applicant merely claims that, if granted the visa, they would:

- work and pay taxes in Australia
 - pay fees to an education provider or
 - spend money in Australia.
27. Further under PAM 3 in relation to compassionate or compelling circumstances, the circumstances for consideration must be of compassionate or compelling nature in the way they affect the Australian citizen, permanent resident, or eligible New Zealand citizen. Compassionate or compelling circumstances that affect the applicant are not relevant for

consideration unless they also directly affect an Australian citizen, permanent resident or eligible New Zealand citizen. To waive the requirements of any or all of PIC 4020(1) and/or (2), the applicant's circumstances must have a compelling or compassionate element particular to that individual case beyond those usually present in that visa caseload.

28. When raised with him, the applicant submitted he is a genuine student, which the Tribunal accepts and will complete his Bachelor [degree] in July 2018. He referred to his claim he had not broken any Australian laws. He repeated that he did not knowingly submit a false document but it was the fault of the agent in Pakistan. While the Tribunal accepts the applicant's evidence it is not satisfied on the basis of the evidence before it that these circumstances, as raised by the applicant, are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. Rather they are circumstances that affect the applicant.
29. Having considered all of the evidence, including the factors raised both singularly and cumulatively, the Tribunal is not satisfied that there are compelling circumstances that affect the interests of Australia or compelling or compassionate circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the grant of the visa. Therefore the Tribunal is not satisfied that the requirements of PIC 4020(2) should be waived.
30. Therefore the requirements of cl.4020(1) or (2) should not be waived.
31. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.500.217(1).

DECISION

32. The Tribunal affirms the decision not to grant the applicants Student (Temporary) (Class TU) visas.

Gabrielle Cullen
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...